No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DiGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATEMENT OF THE CASE

In his brief on the merits, the respondent goes far beyond the scope of the Second Circuit's ruling, making a sweeping attack on attachments in general, often relying on facts which are not in the record and/or blatantly false or misleading. The petitioners respond briefly herein.

The holding of the Second Circuit upon which this Court granted certiorari is that the statute at issue "violates the requirements of due process because (1) it permits the issuance of *ex parte* attachments in the absence of extraordinary

circumstances . . . ."[1] *Pinsky v. Duncan*, 898 F.2d 852, 858 (2d Cir. 1990), Pet. App. 16A.

The issue before this Court is whether Conn. Gen. Stat. § 52-278e(a)(1), as *written* and as interpreted by the Connecticut Supreme Court, satisfies Fourteenth Amendment procedural strictures. Based upon applicable case law, the statute satisfies these due process requirements.

[1] Judge Pratt's second ground, that the statute fails to require a bond or other security before obtaining the attachment, was not accepted by the two other panel members and is not the holding of the court. As discussed below, respondent did not file a cross-petition with this Court on this point.

ARGUMENT

I. THE RESPONDENT'S BRIEF RELIES ON FACTS WHICH ARE NOT IN THE RECORD AND ON FACTS AND LAW WHICH ARE ERRONEOUS.

This case arose in the District Court on summary judgment. The *only* facts submitted under Local Rule 9, which requires a statement of material facts on such a motion, were that a suit for assault and battery had originally commenced in the Superior Court, and that an attachment under Conn. Gen. Stat. § 52-278e(a)(1) had occurred. J.A. 14A.

Now apparently not satisfied with the facial attack being made on the statute, respondent is trying to add to the record at this time by referring in his brief to numerous facts never presented below. Indeed, even respondent acknowledges that, unlike this case, an "as applied" case would be possible, consisting of "available empirical evidence," but that such was never presented. Respondent's brief at 30. Each of these attempts at amplification should be rejected by this Court. These additions will be discussed below.

A. The Expeditious Hearing

The respondent repeatedly makes the claim, unsupported by any evidence of record, that the statute, Conn. Gen. Stat. § 52-278e(c), does not guarantee an "expeditious" hearing. *See* respondent's brief at 4, 7, 13 (note), and 23. In fact, § 52-278e(c) specifically requires an expeditious hearing, and the Connecticut Supreme Court has interpreted this to require an *immediate* hearing. *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 398, 423 A.2d 80, 83 (1979).

This interpretation of the highest court of the state is binding on the Superior Court. Although respondent has

made reference to delays of months or years in obtaining hearings, he has provided no evidence in the record to support this, although he had ample opportunity in the District Court to do so.[2]

In fact, contrary to respondent's unsupported allegations, in a Connecticut Supreme Court case interpreting the statute at issue, a hearing was provided *one week* after the defendant moved to dissolve the remedy. *Fermont*, 178 Conn. at 395. Thus, respondent's new, unsupported allegations should be disregarded by this Court.

B. Judicial Determination Of Probable Cause

Respondent now claims that the statute does not require a judicial determination of probable cause before attachment, and that the judge acts only as a "rubber stamp" with no discretion to deny or modify the prejudgment remedy. *See* respondent's brief at 22, 25.

The respondent has provided no evidence of record to support this claim, probably because it is false on its face. Conn. Gen. Stat. § 52-278e(a)(1) requires a finding of probable cause by a judge before an attachment may be approved, and the Connecticut Supreme Court has so interpreted the statute. *See Fermont*, 178 Conn. at 397, 423 A.2d at 83; Newman, J. dissenting in *Pinsky* at 862, Pet. App. at 26A. Certainly judges are presumed to carry out their responsibilities in the absence of evidence to the contrary.

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[2] *Gerardi v. Statewide Insurance Co.*, Civ. No. N-86-266(EBB), cited twice by respondent, did not involve prejudgment attachment; it involved a temporary restraining order, specifically exempt from this statutory scheme. Conn. Gen. Stat. § 52-278a(d).

C. Factual Allegations In Affidavit

Respondent falsely contends in his brief that the application for prejudgment remedy may be based upon mere conclusory allegations, without specific underlying facts. Respondent's brief at 22. This is directly contradicted by the language of the statute as interpreted by the Connecticut Supreme Court in *Kukanskis v. Griffith*, 180 Conn. 501, 505, 430 A.2d 21, 23 (1980) ("Because § 52-278e(1) requires a *factual showing* that probable cause exists to sustain the validity of plaintiff's claim, it comports with constitutional requirements.") (emphasis added). *See also* Newman, J. dissenting in *Pinsky* at 862, Pet. App. at 26A.[3]

D. Allegations Of Harm To Respondent Are Not In The Record

Apparently recognizing the dearth of evidence in the record below concerning harm to respondent from the lack of a pre-attachment hearing, the respondent now attempts to create a record for this Court by making sweeping, unsupported allegations of serious economic and psychological harm.[4]

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[3] The respondent claims that the affidavit in this proceeding was insufficient. Respondent's brief at 1. But this affidavit did set forth the facts giving rise to the assault and battery claim as well as describing in detail the nature of the serious injuries suffered. As regards the showing needed under § 52-278e(a)(1), it is clear that this section refers back to § 52-278c and § 52-278d, both of which require detailed factual affidavits.

[4] The following are allegations made in the respondent's brief with no basis in the record; some are "entirely theoretical." Newman, J., *Pinsky* at 863, Pet. App. at 28A.

Page 8: A prejudgment remedy on real estate will defeat the defendant's efforts to "finance one's defense, to pay for home repairs, education, medical expenses, to buy a car, to move up to a more expensive home."

Page 10: The defendant is financially and psychologically affected by the real estate attachment.

(continued)

These allegations should be disregarded out of hand, not only because they find no support in the record, but also because they often relate to harm stemming from the nature of attachments in general, unrelated to the issue of a prior hearing. The Second Circuit's ruling dealt with the *timing* of the hearing and did not address the constitutionality or the speculative harm of attachments themselves.

E. A Defendant May Receive A Prompt Hearing Regardless Of The Return Day

Respondent argues at 3 that the defendant must await the running of the return day before he appears to contest the attachment. This is untrue. Upon service, the defendant may ask for a probable cause hearing. The notice to the attached party required by Conn. Gen. Stat. § 52-278e(b) indicates that a hearing to challenge or seek modification of the attachment is available upon request, and gives no indication that the party must await the return day. Indeed, the defendant in this case appeared one week *before* the return day, even though he chose not to request a hearing. J.A. 33A.

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[4] *(continued)*

Page 19: The attachment may impair transfer of the property, borrowing against the property, cause a default in the defendant's mortgage, and impair his credit rating.

Page 20: An attachment leads to an "increase in the size of the judgment."

Page 20: Attachments are used to "pressure the debtor to pay a disputed claim."

Page 22: Judicial participation is *pro forma* and few attachments are refused or modified.

Page 31: Citations to empirical evidence from two studies not in evidence.

These "facts" are not before this Court and should not enter into the analysis of the issues herein.

F. The Respondent Has Incorrectly Interpreted Precedent

Petitioners disagree with numerous statements of law in respondent's brief. The following highlight the major disagreements:

On page 6, respondent states that "[a]ttachment . . . is tantamount to an involuntary dispossession," citing 45 A.L.R.2d 1221 (1956). This quotation is found in an annotation discussing remedies in general and has no applicability to an attachment on real property. *Id.* at 1234.

The elaborate string of citations on Page 9 of respondent's brief is apparently added to the brief to show that *ex parte* prejudgment attachments on real property have uniformly been held unconstitutional. Yet these cases involve statutes which are entirely distinguishable from Connecticut's provisions and lack the numerous protections of Connecticut's statutory procedure.

The citation to *United States v. The Premises at Livonia*, 889 F.2d 1258 (2d Cir. 1989) is wholly irrelevant. In *Livonia*, the homeowner, without prior hearing, forfeited his property to the federal government on the finding of a narcotics violation. *Livonia* hardly involves the temporary and non-invasive situation found under the Connecticut statute.

Finally, there is no showing in *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975), as respondent contends at 17, that this Court relied on the lack of the creditor's pre-existing interest in the debtor's bank account in finding the garnishment unconstitutional. It was the failure of the Georgia statutes to have various "saving characteristics" which voided the garnishment there, saving characteristics which are all present in the case at bar.

G. The Governmental Interest

The respondent claims that the goal of a state's prejudgment remedy mechanism must be to remain impartial (page 28 respondent's brief). Here Connecticut's statutory scheme has done just that. The Connecticut statute is even-handed in approach, allowing the creditor or other claimant to obtain or preserve a remedy and at the same time providing protection to the homeowner from arbitrary action or serious harm. This is the essence of procedural due process.

II. THE HOMEOWNER IS PROTECTED FROM WRONGFUL ATTACHMENT UNDER THE CONNECTICUT PROCEDURE.

In Part III of his brief, the respondent attempts to raise the argument, rejected in the Second Circuit, that the failure of Connecticut to require a bond by the plaintiff is unconstitutional. Judge Mahoney in his concurrence and Judge Newman in his dissent held otherwise. As Judge Newman pointed out in *Pinsky:* "[S]ince this . . . point does not command the support of a majority of the panel, it is not a requirement imposed by today's ruling." *Pinsky,* 898 F.2d at 862, Pet. App. 25A.

Respondent did not file a cross-petition for certiorari under Supreme Court Rule 12.3; therefore the issue of the plaintiff's bond is not before the Court. Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) § 6.35 (where prevailing party seeks modification of judgment imposing additional ground of recovery not accepted by circuit court, a cross-petition should be filed).

In any event, the Second Circuit's concurring and dissenting judges undoubtedly were correct in deciding that protection of the homeowner from wrongful attachment was accomplished by the right to sue for double damages under Conn. Gen. Stat. § 52-568(a). The cases cited by respondent,

see, e.g., Jones v. Preuit & Mauldin, 822 F.2d 998, 1002 (11th Cir. 1987), require protection by bond or *otherwise.*[5] Connecticut law adequately provides the "otherwise" sufficient to satisfy due process.

Certain decisions in Connecticut, such as *Hydro Air of Conn., Inc. v. Versa Technologies, Inc.,* 99 F.R.D. 111 (D. Conn. 1983) (applying Connecticut law) approve a counterclaim for wrongful attachment in the main suit. But even if a separate suit is required by the attached party, this is an adequate remedy to restrain the possible illegal action of the attaching plaintiff. This certainly meets what this Court has required for procedural due process.

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[5] The respondent has not accurately quoted from this case in his brief at 34. The court stated that procedural protections were needed, but did not mandate that these protections include a bond.

CONCLUSION

The opinion and judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

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